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No. 87-745

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

FORD MOTOR COMPANY, et al.,

Petitioners

v.

TUNIS BROTHERS COMPANY, INC.,
RICHARD N. DE LA RIGAUDIERE,
and DAVID C. SMITH,

Respondents

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

REPLY BRIEF OF PETITIONERS

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In their Brief in Opposition to the Petition for a Writ of Certiorari, Tunis Brothers attempts to dissuade this Court from reviewing the decision below by boldly mischaracterizing this case as one involving "direct evidence" of conspiracy. There is no support for that in the record. In fact, neither the Third Circuit nor the District Court ever referred to any direct evidence of conspiracy; the issue has always been how to treat respondents' ambiguous, circumstantial evidence in the context of petitioners' motion for summary judgment.

Under *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348 (1986), unless the ambiguous circumstantial evidence is more consistent with illegal conspiracy than lawful, independent conduct, summary judgment is properly granted against plaintiffs. Tunis Brothers tries to pull this case out of the *Matsushita* mold by characterizing the evidence as direct, not circumstantial. But given that neither the Third Circuit nor the District Court ever found any direct evidence of conspiracy, the real issue remains whether, upon remand by this Court, the Third Circuit has appropriately followed *Matsushita*.

Despite the voluminous record in this case,[1] Tunis Brothers relies on only one piece of evidence to support its unique contention that this case involves "direct evidence" of conspiracy. That evidence is the highly inconclusive fact that two Ford employees who opposed plaintiffs' dealership application, Messrs. Fraher and Hasel, also served as directors and officers of Wenner Ford.[2] (Brief in Opp. 26-27). Implicitly conceding the ambiguous import of that fact, respondents argue that "[i]t is reasonable *to infer* that Fraher and Hasel were mindful of their corporate obligations as officers and directors of Wenner Ford when they . . . rejected plaintiffs' application . . ." and that, therefore, "they conspired for both companies when they acted." *Id.* 27-28 (emphasis added). In other words, respondents

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1. The record below consists of 16 depositions and thousands of pages of documents produced by defendants.

2. This is not unusual. Ford employees routinely act as directors for Dealer Development dealerships since Ford policy requires Regional Managers to be officers of every Dealer Development corporation in their region. Fraher and Hasel, for example, served on 10 Dealer Development boards (including Wenner's).

Although not expressly citing it as direct evidence, Tunis Brothers places great reliance on the fact that John Wenner had lunch in a local restaurant at the same time as plaintiffs were lunching with Ford representatives. The record is clear that John Wenner was there simply to have lunch and not to meet with Ford. As such, the mere coincidence of Wenner and Ford people being in the same restaurant at the same time is, at best, circumstantial evidence of plaintiffs' alleged conspiracy — particularly because plaintiffs themselves were present and seated with the Ford personnel.

infer that Fraher and Hasel acted simultaneously in two capacities — on behalf of Ford and Wenner Ford — when they acted to reject Tunis Brothers' application for the Kennett Square location.

That allegedly critical evidence is highly ambiguous on at least two levels. First, it is ambiguous and inconclusive with regard to the claim that those Ford employees were acting in any capacity other than as Ford employees. Respondents can only speculate — as they do — that Fraher and Hasel were acting for Wenner Ford when they rejected the Tunis Brothers' application; for not even respondents can point to any direct evidence of that.[3] They argue, without any direct support, that it is reasonable to infer that those men were acting for Wenner Ford as well as Ford. That speculation, however, is contrary to the conclusion of the District Court which expressly found that there was no evidence that Ford employees were acting in any capacity other than as Ford employees when they decided to deny plaintiffs' application. (A-64).[4]

Second, there is no evidence that Fraher and Hasel "conspired" with anyone when they recommended that Tunis Brothers' application be denied. There is no evidence of any meetings, discussions, agreements, or any communications whatsoever between Ford and Wenner Ford regarding plaintiffs' application.[5] Rather, the record establishes that the deci-

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3. Direct evidence is, of course, "evidence, which if believed, proves the existence of a fact in issue *without inference* or presumption." *Black's Law Dictionary* 413 (5th ed. 1979) (emphasis added).

4. As Judge Hunter noted in his dissenting opinion in *Tunis II*, the fact that Fraher and Hasel were both Ford Motor employees and nominal directors of Wenner Ford establishes at most "the opportunity to conspire" and does not, without more, create a jury question on the issue of concerted action. (A-7). Anybody can infer whatever he wants, but ambiguous, circumstantial inferences do not outweigh the direct evidence of independent, unilateral conduct by Ford to deny Tunis Brothers' application

5. If there had been any such direct evidence, the Third Circuit would have so noted, as it did recently in *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335 (3d Cir. 1987). In *Arnold Fontiac*, the Third Circuit found that the case was factually distinguishable from *Matsushita* because it involved direct evidence of conspiracy in the form of a memorandum, describing a

sion to deny the Tunis Brothers application was made independently and in good faith by Ford employees alone. Respondents do not contend that John Wenner was involved in the decision. Nor could they, because in the words of John Wenner:

> At no time before or since I became President of Wenner Ford have I had communications with any employees of Ford Motor Company, Ford Motor Credit Company or anyone acting in their behalf in which I complained about Tunis Brothers Company, Inc., Richard Tunis, David Smith or Richard de la Rigaudiere.
>
> At no time have I ever communicated with any employee of Ford Motor Company, Ford Motor Credit Company or anyone acting in their behalf in which I sought termination of Tunis Brothers. . . . In fact, at no time have I ever been asked about my opinion concerning the need for a Ford tractor dealership in Kennett Square nor was I ever consulted concerning the application of David Smith and Richard de la Rigaudiere to become authorized Ford tractor dealers in Kennett Square.[6]

The conspiracy as now alleged by Tunis Brothers is actually by Mr. Fraher with himself, allegedly acting in two different capacities (and by Hasel with himself in the same two different capacities). Certainly it is highly problematic for Tunis Brothers to assert that a person can conspire with himself. Moreover, the evidence that either Fraher or Hasel acted in two capacities (for Wenner Ford and Ford) is, as both the District Court and Third Circuit have implicitly observed, highly ambiguous and inconclusive. *Matsushita* is therefore directly applicable. It mandates that to avoid summary judgment a plaintiff must present evidence that conspiracy is more plausible than independent action. The mere existence of indirect, ambiguous evidence

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meeting between the various co-conspirators. *Id*. at 1338. The record in this case contains no such direct evidence of conspiracy.

6. Affidavit of John Wenner accompanying defendants' Motion for Summary Judgment, para. 7, 8.

supporting an inference of conspiracy is not enough for plaintiffs to overcome defendants' motion. 106 S.Ct. at 1356.

As set forth in detail in the petition for certiorari, although the Third Circuit found that the record supported the conclusion that "Ford's termination of the Tunis Ford tractor dealership is as consistent with an inference of independent action by Ford Motor Company as it is with an inference of illegal conspiracy,"[7] contrary to *Matsushita*, it relieved plaintiffs of their burden of proving that, on balance, an inference of conspiracy is *more* plausible than independent action. Immediate review by this Court is necessary to prevent the undermining of *Matsushita* and the consequent injury to competition policy that will arise if factfinders are permitted to infer conspiracies on the basis of implausible, ambiguous evidence such as exists in this case.

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7. Thus, even the Third Circuit would disagree with respondents' outlandish statement that "the record does not support petitioners' contention that 'the need for Ford to discontinue its Kennett Square site had independent business validity.' " (Brief in Opp. 29).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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